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No. 85-438

In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK W. SIMMONS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed the Interstate Commerce Commission's interpretation that 49 U.S.C. 10905 does not permit the imposition of labor protection as a condition for the sale of rail lines that would otherwise be abandoned.

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OPINIONS BELOW

The petition for a writ of certiorari embraces two cases that involve identical or closely related questions. The opinion of the court of appeals in the first case (*Simmons I*) (Pet. App. 1a-10a) is reported at 760 F.2d 126, and the opinion in the second case (*Simmons II*) (Pet. App. 13a-22a) is reported at 766 F.2d 1177. The Interstate Commerce Commission's underlying decision in *Simmons I* (Pet. App. 26a-32a) is reported at 366 I.C.C. 911; its decision in *Simmons II* (Pet. App. 46a-52a) is unreported.

JURISDICTION

The judgments of the court of appeals in *Simmons I* and *Simmons II* (Pet. App. 11a, 23a) were entered on March 15, 1985, and July 15, 1985, respectively. A petition for rehearing in *Simmons I* was denied on May 2, 1985 and the court's

opinion was amended on that date. On July 11, 1985, Justice Stevens extended the time for filing a petition for a writ of certiorari in *Simmons I* to and including August 30, 1985, and on August 21, 1985, further extended the time to September 14, 1985. The petition for a writ of certiorari was filed on September 13, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATEMENT

1. This case involves the provisions of the Staggers Rail Act amendments to the Interstate Commerce Act regulating the process by which rail carriers may abandon unprofitable lines. Under 49 U.S.C. 10903, a carrier may abandon a rail line (or discontinue rail operations on a line) only if it obtains permission from the Interstate Commerce Commission (ICC) and only if it provides certain protections to its employees. 49 U.S.C. 10903(b)(2). That procedure does not apply, however, when a financially responsible person comes forward within ten days and offers to purchase the line to provide continued rail service. In that event, 49 U.S.C. 10905(d) requires the ICC to postpone abandonment authorization. The prospective purchaser then has 30 days in which to negotiate a sale agreement with the current owner. If they fail to reach an agreement within that time, either party may request the Commission to set the terms of the sale. 49 U.S.C. 10905(e). The Commission must then do so within 60 days (49 U.S.C. 10905(f)), establishing a purchase price that is not below the "fair market value of the line." 49 U.S.C. 10905(f)(1)(C). Unless the purchaser elects to withdraw his offer within ten days, the Commission's decision is binding on both parties. 49 U.S.C. 10905(f)(2). And, once a binding agreement exists (whether voluntary or imposed by the ICC), the line cannot be abandoned and the abandonment proceeding must be dismissed. 49 U.S.C. 10905(e). See *Hayfield N. R.R.* v. *Chicago & N. W. Transp. Co.*, No. 82-1579 (June 12, 1984). See also *Chicago & N. W.*

Transp. Co. v. *United States*, 678 F.2d 665, 666 (7th Cir. 1982); *Illinois Central Gulf R.R.* v. *ICC*, 717 F.2d 408, 409-411 (7th Cir. 1983); *Black* v. *ICC*, 737 F.2d 643 (7th Cir. 1984).

2. The present proceedings involve the ICC's dismissal of two abandonment proceedings following the purchase of the lines under Section 10905.[1] In both cases the Commission had found the lines to be an economic burden and had initially approved the abandonment, subject to the standard labor protective conditions required by Section 10903(b)(2).[2] But the lines were not abandoned; instead they were sold for continued rail service pursuant to Section 10905. (The terms of the sale were agreed upon voluntarily in *Simmons I*, and were set by the Commission in *Simmons II*.) Petitioner asked that the Commission's dismissals of the abandonment proceedings and authorizations of the sales under Section 10905 be conditioned upon protection of the affected employees.[3] In both cases the Commission declined

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[1]In *Simmons I*, the Commission had dismissed, for the most part, No. AB-43 (Sub-No. 92) (ICC Mar. 1, 1983), when it approved a proposal by Cairo Terminal Railroad Company (CTRC) to acquire all but one-half mile of an 18 mile line owned by the Illinois Central Gulf Railroad (ICG) (Pet. App. 24a-25a).

In *Simmons II*, the Commission had dismissed No. AB-43 (Sub-No. 85) (ICC Mar. 12, 1984), when it ordered ICG to sell the line involved there to Cisco Cooperative Grain Company (Cisco), a noncarrier (Pet. App. 53a-54a).

[2]These are the labor protective conditions established in *Oregon Short Line R.R.—Abandonment—Goshen*, 360 I.C.C. 91 (1979) (the *Oregon III* conditions). They require, inter alia, that the abandoning carrier give 90 days' advance notice to its employees of the intended transaction; negotiate an implementing agreement before consummating the transaction; and provide displaced employees with other positions and/or up to six years of salary protection.

[3]In *Simmons I*, the ICG employees affected by the removal of the line from ICG's system were protected by the *Oregon III* conditions, since a half mile of the line was not purchased by CTRC but was abandoned by

on the ground that it lacks the authority to do so under Section 10905 (Pet. App. 26a-32a, 47a).

In concluding that Congress did not intend to give it such authority, the Commission noted (Pet. App. 28a-30a) that: (1) Section 10905(e) expressly requires the dismissal of the underlying abandonment application when a purchase is made under Section 10905, and thus no conditions qualifying Commission approval of the abandonment (including labor protection) can survive; (2) Congress did not provide for any labor protection in Section 10905 transactions even though in the Staggers Rail Act of 1980 (which had amended that section) Congress gave labor issues intense scrutiny and enacted several provisions that either required labor protection or gave the Commission discretion to impose such protection in other contexts; and (3) although the Commission has issued many decisions under Section 10905, all without labor protection, Congress has not taken any action to change this practice.[4]

ICG pursuant to Section 10903. Petitioner had requested the Commission to impose the *New York Dock* conditions on the sale of the line. These conditions were established in *New York Dock Ry. — Control — Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979), and are virtually identical to the *Oregon III* conditions, except that the *New York Dock* conditions are imposed on each of the carriers involved in a merger or consolidation proceeding. Thus, petitioner wanted CTRC, as well as ICG, to bear labor protection obligations.

In *Simmons II*, petitioner had requested that, in establishing the terms of purchase, the Commission (1) "continue" the *Oregon III* conditions imposed upon ICG in the abandonment decision, and (2) provide that any carrier contracting with Cisco for operation of the line be subject to the *New York Dock* conditions.

[4]The first of these decisions reviewed by a court was *Chicago & N.W. Transp. Co.—Abandonment*, 363 I.C.C. 956 (1981), aff'd, 678 F.2d 665 (7th Cir. 1982). More recent decisions include: *Seaboard System R.R.—Abandonment—In Chatham County, NC*, No. AB-55 (Sub-No. 74) (ICC served Feb. 10, 1984); and *Grand Trunk Western R.R.—Abandonment—In Montcalm & Gratiot Counties, MI*, No. AB-31 (Sub-No. 8) (ICC served May 18, 1984).

3. In *Simmons I* (Pet. App. 1a-10a) the court of appeals affirmed the agency interpretation of Section 10905 as neither requiring nor permitting labor protective conditions to be imposed as a condition of sale. The court first noted (*id.* at 4a) this Court's "recent and emphatic directive" in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), to give great weight to an agency's interpretation of the statutes it enforces. The court then concluded (Pet. App. 4a) that the agency's interpretation was both reasonable and correct.

The court largely adopted the rationale articulated by the Commission (see Pet. App. 4a-5a). The court noted that Section 10905 gives the Commission the power to fix only "the price and other terms of sale" (but not conditions specifically protecting labor) and that in all other respects the Commission has no discretion and "shall approve the transaction." In contrast, the statutes governing other kinds of transactions expressly provide for either mandatory or discretionary labor protection. See, *e.g.*, 49 U.S.C. 10901(e), 10903(b)(2), 11103(c)(2) and 11347. The court observed (Pet. App. 5a) that "[a]gainst this background, the silence of section 10905 on the matter of conditions has a certain eloquence, especially when we consider the active participation of the railroad unions in revisions of the Interstate Commerce Act."

The court rejected petitioner's suggestion that labor protective provisions found elsewhere in the statute be engrafted onto Section 10905. It explained (Pet. App. 5a):

> a transaction under [Section 10905] cannot be an abandonment, because when the Commission approves a section 10905 sale it must dismiss the abandonment proceeding. And it cannot be a line acquisition or a railroad consolidation, as section 10905 requires the

> Commission to act peremptorily if the conditions in the section are satisfied, regardless of whether the criteria used in evaluating other transactions are satisfied. See 49 U.S.C. §§ 10901(a), 11344(d).

The Court found the ICC's interpretation to be reasonable and consistent with Congress's objectives and pointed out the practical difficulties that would arise if the statute were interpreted in any other way (Pet. App. 8a):

> if we held that section 10905 authorizes labor protection we would have the embarrassing task of deciding without statutory guidance what protection it should be: *Oregon Short Line*? *New York Dock*? Discretionary protection as under section 10901? Good arguments could be made for all three and we are disinclined to choose among them without a clearer indication that Congress wanted us to do so. If the statute is to be supplemented, it should be done by Congress or by the Commission, not by us. Having due regard for the Commission's considered refusal to do so, we hold that there is no labor protection in a section 10905 sale.

4. In *Simmons II*, a different panel of the same court also reaffirmed the ICC's construction of the statute (Pet. App. 13a-22a), finding no basis for distinguishing between a "voluntary" and "forced" sale in this regard (*id.* at 19a-21a).[5] It concluded that the statutory phrase "price and other terms of sale" does not embrace labor protective conditions and that the ICC lacks authority to impose

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[5]The court also rejected petitioner's attempt to distinguish *Simmons II* from *Simmons I* because Cisco was not a "carrier." It noted that Section 10905 requires only that the purchaser be a "financially responsible person" who will provide continued rail service on the line (Pet. App. 17a n.4).

conditions on a sale under Section 10905 beyond the "price and other terms of sale" (Pet. App. 20a). Finally, the court rejected petitioner's argument that Congress had ratified or "acquiesced" in the agency's pre-Staggers Act interpretation of former Section 10905 to allow imposition of labor protective conditions. The court emphasized that the Staggers Act fundamentally altered Section 10905 by providing for forced sales, mandatory dismissal of the abandonment proceeding, and mandatory approval of voluntary transactions (Pet. App. 21a). The court echoed the view of the panel in *Simmons I* that (*ibid.*), " '[i]f the statute is to be supplemented, it should be done by Congress or by the Commission, not by us.' "

ARGUMENT

The judgments below are correct and do not conflict with the decisions of this Court or of any other court of appeals. Further review is not warranted.

1. It is a familiar and well settled principle that "the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 6. Accordingly, "[t]o sustain [the agency's decision], we need not find that [the ICC's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946); see *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371-372 (1973). "We need only conclude that it is *a* reasonable interpretation of the relevant provisions." *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 423 (1983) (emphasis in original).

Petitioner suggests nothing that would justify overturning the agency's interpretation, which is clearly reasonable and consistent with the express terms of Section 10905 and with the overall statutory scheme. Nor does the language of Section 10905 offer any support for petitioner's argument that the Commission has authority to impose labor protection. Quite the contrary, the explicit language of Section 10905 compels the court of appeals' conclusion: the statute requires that all conditions qualifying the agency's approval of the abandonment under Section 10903 (which includes labor protection) must be dissolved with the dismissal of the abandonment application. Moreover, the Commission lacks a separate general power to impose such conditions under Section 10905. Compare Section 10903(b)(1)(A)(ii). It may only "determine the price and other terms of sale." 49 U.S.C. 10905(f)(1)(C). A condition requiring ICC-imposed labor protection is clearly not a necessary or typical "term of sale" related to the means of effecting the transfer of the line under Section 10905. See, *e.g.*, Pet. App. 51a.

As the court of appeals recognized, given the potentially large costs associated with labor protections, imposing such a condition could significantly affect the amount of compensation that is paid by the buyer or received by the seller. Since Section 10905(f)(1)(C) requires that "[i]n no case shall the Commission set a price which is below the fair market value of the line," the additional burden of labor protection would have anomalous results. If the selling carrier were required to pay labor protection costs, as petitioner urges here, the net amount it realized in the transaction would be reduced correspondingly. On the other hand, if the labor protection burden were placed on the buyer, it could substantially increase the buyer's costs of the transaction and discourage many purchases of lines for continued rail service. Moreover, it would be contrary to other longstanding

policies, such as not imposing labor protection conditions on newly formed acquiring carriers, such as Cisco.[6]

2. Petitioner can draw no support from those cases (cited at Pet. 13-14) in which (prior to the enactment of current Section 10905) the Commission, acting under Section 10901, authorized the acquisition of rail lines slated for abandonment and (at times) imposed labor protective conditions. Unlike the provision at issue here, Section 10901(e) expressly authorizes the agency, in its discretion, to impose such conditions. Specific reference to labor protection elsewhere shows that Congress knows how to provide for such protection when it chooses. The omission of such language from Section 10905 is therefore a strong indication that Congress did not intend to give the Commission authority to impose labor protection in Section 10905 proceedings.[7]

Petitioner offers no more than policy arguments for a different result. These arguments are more appropriately addressed to Congress than to the courts.

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[6]This policy has been consistently recognized and approved by the courts. See, *e.g., In re Chicago, M., St. P. & Pac. R.R.*, 658 F.2d 1149, 1171 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982) (the burdens on new operators are great enough without the additional costs of labor protection); *Durango & S.N.G.R.R.—Acquisition & Operations*, 363 I.C.C. 292, 295 (1979), aff'd *sub nom. Railway Labor Executives' Ass'n* v. *United States*, 697 F.2d 285, 286 (10th Cir. 1983); *Simmons* v. *ICC*, 697 F.2d 326, 336-337 (D.C. Cir. 1982). See also *Cadillac & Lake City Ry.—Acquisition & Operation*, 320 I.C.C. 617 (1964).

[7]Petitioner relies (Pet. 15-16) on *Railway Labor Executives' Ass'n* v. *ICC*, 735 F.2d 691, 700-702 (2d Cir. 1984) to support its contention that the Commission misconstrued Congress's silence in the wake of other statutes specifically providing for labor protection. That case is inapposite because, as the court noted there, congressional conference committee reports specifically stated that legislative revisions to Section 10903 should not be read as requiring the Commission to depart from its policy of not imposing labor protection on whole line abandonments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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